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In the Supreme Court of the United States

OCTOBER TERM

No. 74-1648

WINSTON JAMES THOMPSON,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

A. F. SUMMER
Attorney General
By: KAREN GILFOY
Assistant Attorney General
and
By: JOHN C. ELLIS
Special Assistant Attorney General
Of Counsel
Post Office Box 220
Jackson, Mississippi 39205

E. L. MERIDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106. 421-3030

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OPINION BELOW

The opinion of the Supreme Court of Mississippi is reported as *Winston James Thompson, alias Percy Young and alias Wade Moore* v. *State*, 309 So.2d 533 (Miss. 1975).

Rehearing was denied on March 31, 1975. A copy of the Opinion is before this Court as Appendix A to the Petition for Writ of Certiorari.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C., Section 1257(3). Petitioner has posed two questions for review; as to petitioner's question number 1, respondent acknowledges the jurisdiction requisites are adequately set forth. However, jurisdiction of petitioner's question number 2, as now before this Court, is improperly invoked through the authority of 28 U.S.C., Section 1257(3) as hereinafter set forth in respondent's argument.

QUESTIONS PRESENTED

1. Petitioner's question number 1 does not accurately state the argument advanced by petitioner. Correctly redrafted, the question should be whether petitioner was deprived his due process rights by the Mississippi rule regarding the inadmissibility of declarations against penal interest where the declarant is not available as a witness and a valid state purpose is served by excluding untrustworthy testimony.

2. As hereinafter set forth, the constitutional issue presented is not properly before this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner seeks to invoke the provisions of the Constitution of the United States, Amendment XIV, Section 1.

STATEMENT OF THE CASE

The review of the facts as presented in the opinion of the Supreme Court of Mississippi (Appendix to the Petition) are accurate and are adopted by respondent in the interest of brevity. Petitioner, however, has grossly misstated one fact in his petition which must be corrected. In his petition at 3, he states:

> . . . the state was allowed to show that petitioner pleaded guilty to a *misdemeanor* charge of false pretenses which grew out of the passing of a forged check at a bank in Laurel, Mississippi, on the same date, and in which the same modus operandi were used (R. 171). Petitioner, while readily admitting that he pleaded guilty to the false pretenses charge, denied that he was guilty of the crime (R. 171, 181), and explained that the guilty plea was entered because the state had agreed to reduce the charges to a *misdemeanor*. . . . (Emphasis added)

Petitioner did enter a plea of guilty to the charge of false pretenses, which charge was reduced from the original indictment for forgery. (R. 178, 183) There is, however, nothing in the record to support petitioner's allegation that such guilty plea was made to a misdemeanor. The sole disclosure in the record to the degree of petitioner's prior conviction was an unrebutted announcement that petitioner had pled guilty to a felony. (R. 206)

To document the degree of petitioner's prior conviction, respondent attaches a copy of the sentence imposed to petitioner's guilty plea. (Appendix A) The sentence of three years in the Mississippi State Penitentiary, which was suspended upon certain conditions, clearly announces

a felony conviction under Mississippi Law. SEE: Mississippi Code Annotated (1972), Section 1-3-11.

Any other portion of the petitioner's statement of the case which is subject to more than one interpretation is fully developed in the body of respondent's argument.

REASONS FOR DENYING THE WRIT

No questions of substance are presented by petitioner's assertions of denial of his rights guaranteed under the Fourteenth Amendment to the Constitution of the United States.

The opinion of the Mississippi Court—that the out-of-court declaration against penal interest was not sufficiently trustworthy to be admissible as an exception to the hearsay rule—is not at variance with the applicable decisions of this Court and thus the issue presented does not warrant expressed or codified judicial interpretation.

The second issue raised by petitioner is both misleading, as petitioner pled guilty to a felony, not a misdemeanor, and is not properly before this Court as hereinafter set forth in respondent's argument. Furthermore, the State Supreme Court did not base its decision on federal or state constitutional grounds.

ARGUMENT

1. Whether Petitioner Was Deprived His Due Process Rights by the Mississippi Rule Regarding the Inadmissibility of Declarations Against Penal Interest Where the Declarant Is Not Available As a Witness and a Valid State Purpose Is Served by Excluding Untrustworthy Testimony.

Petitioner contends that he was denied due process by the exclusion of the testimony of Attorney W. S. Moore. Attorney Moore was called as a defense witness and testified out of the presence of the jury. (R. 185-194) Mr. Moore testified that he formerly represented the appellant on the instant charge and the forgery charge in Jones County. (R. 186-188)[1] Moore stated that at a time prior to trial (sometime in August, September, or October, 1972) when he was representing petitioner, the latter came to his office with a man who said he was Roger Carr Davis. According to Moore, Davis admitted committing both crimes for which appellant had been charged. (R. 190, 191) Moore also stated that restitution was made to the Bank of Hazlehurst by petitioner who stated that he received the money from Davis. (R. 193) Moore testified that he had not seen Davis or communicated with him since the night of the aforementioned conversation, nor did he know where Davis was at the time of the trial. (R. 192, 193)

Petitioner claims that such testimony is admissible as a declaration against penal interest of Roger Carr Davis [Petition for Writ of Certiorari at 5], and that the trial court erred in excluding such testimony.

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1. Mr. Moore also represented petitioner in his Petition for Rehearing before the Mississippi Supreme Court and is presently representing him before this Court.

BLEED THROUGH

At issue is the Mississippi rule of evidence which prohibits the admissibility of declarations against penal interests where the declarant is unavailable as a witness. This rule was announced in *Brown* v. *State*, 99 Miss. 719, 55 So. 961 (1911), where the Supreme Court of Mississippi held that such declarations are mere hearsay, and are excluded for that reason, ". . . although other reasons doubtless exist in the uncertainty to which it would subject all criminal proceedings. . . ." 99 Miss. 726, 55 So. 961.

Declarations against penal interest have also been excluded in federal courts under the authority of *Donnelly* v. *United States*, 228 U.S. 243, 33 S.Ct. 449, 57 L.Ed. 820 (1913). The *Brown* and *Donnelly* rules have been recently examined in *Chambers* v. *Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). This Court, however, reserved ruling on whether the exclusion of a declaration against penal interest where the declarant is unavailable at trial might serve some valid state purpose by excluding untrustworthy testimony. It was held that under the facts of *Chambers*, the declarations against penal interest were erroneously excluded, for the statements "were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability." 410 U.S. at 300. SEE ALSO: *United States* v. *Goodlow*, 500 F.2d 954 (8th Cir. 1974). The final circumstance which provided assurance of the truthfulness of the extra-judicial statement in *Chambers* was the presence of the out-of-court declarant at trial.

Even where new rules of evidence expand the declaration against interest exception to include declarations against penal interest, such exception will apply only if corroborating circumstances clearly indicate that the proffered testimony is trustworthy. *E.g., Federal Rules of Evidence*, Rule 804(b) (3) (1975).

This cautious approach to adopting the penal interest exception [SEE: *United States* v. *Goodlow, supra* (Ross, J., dissenting)], has as its purpose a method of circumventing fabrication. Advisory Committee's Comment to Rule 804(b) (3).

This purpose could not be better exemplified than in the situation at bar. To hold Davis's out-of-court confession admissible under the penal interest rule would work a travesty on justice, for there is no assurance that Davis even exists. All we have is a statement that "a person who said he was Roger Carr Davis" (R. 190) made an extra-judicial confession. It seems elementary that in order for the penal interest exception to apply, there first must be corroborating circumstances that clearly indicate that the out-of-court declarant is a real and not an imaginary character.

In the instant case there is no considerable assurance of the out-of-court declarant's existence nor is there any considerable assurance that the proffered hearsay testimony is trustworthy. Petitioner states that Attorney Moore's testimony would have been corroborated by petitioner [Petition at 4], yet the only indication of such corroboration was an unsworn statement of petitioner's trial counsel dictated into the record that petitioner would corroborate Davis's admission. (R. 195-196) Trial counsel's statement is not considered as evidence in Mississippi. SEE: *McNeil* v. *State,* 308 So.2d 236 (Miss. 1975). Petitioner did not corroborate Attorney Moore's testimony, in fact he chose not to be present during this testimony but instead preferred to remain in the courtroom while this hearing was conducted in chambers. (R. 186)

The case at bar thus presents a classic illustration of a valid state purpose served by excluding untrustworthy testimony. Petitioner has no standing to complain of any

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denial of due process for he has not presented sufficient indicia of trustworthiness either to the existence of the out-of-court declarant or to the reliability of such alleged declaration.

Respondent submits that the instant rule of evidence serves a valid state purpose for "the respect traditionally afforded to the States in the establishment and implementation of their own criminal trial rules and procedures"[2] was not diminished by *Chambers*.

If this Court should desire to clarify when declarations against penal interest must be constitutionally admitted, thereby ending the conflict between *Donnelly* v. *United States, supra,* and Rule 804(b) (3) of the *Federal Rules of Evidence,* it should await a more appropriate vehicle for the expansion of such a constitutional evidentiary principle. The instant case, clearly, is not the proper case for the expansion of such a rule.

2. The Constitutional Issue Presented Is Not Properly Before This Court.

It is well established that a claim of constitutional right, title, privilege, or immunity cannot be recognized as properly made when made for the first time in a petition for rehearing after judgment. *E.g., Sayward* v. *Denny,* 158 U.S. 180, 15 S.Ct. 777, 39 L.Ed. 941 (1895).

Petitioner admits that this issue was raised for the first time in his Petition for Rehearing to the Mississippi Supreme Court. (Petition for Writ of Certiorari at 5) This petition was denied without opinion. In the absence of a showing to the contrary, it must be assumed that the court's refusal to pass on the federal question was due to

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2. 410 U.S. at 302-03.

a lack of proper presentation in the state courts. *Street* v. *New York*, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969).

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

A. F. SUMMER
Attorney General

By: KAREN GILFOY
Assistant Attorney General

and

By: JOHN C. ELLIS
Special Assistant Attorney General
Of Counsel

CERTIFICATE

I, John C. Ellis, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a copy of the foregoing Brief for Respondent in Opposition to William Sebastian Moore, 514 Barnett Building, Jackson, Mississippi 39201.

This, the 13th day of October, A.D., 1975.

JOHN C. ELLIS
Special Assistant Attorney General

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State of Mississippi

VS. No. 4434

Winston James Thompson

This day into open Court came the District Attorney who prosecutes for the State of Mississippi and came also Winston James Thompson in his own proper person and represented by counsel and was lawfully arraigned upon an indictment lawfully returned by the Grand Jury of 2nd Dist., Jones County, said State, charging the said defendant with the crime of obtaining money under false pretense, a lesser offense, after changing his plea. And being duly advised of all his legal and constitutional rights in the premises and being further advised of the consequences of such a plea the defendant did then and there enter his plea of guilty to said indictment.

Therefore, for said offense and on said plea of guilty it is by the Court ORDERED and ADJUDGED that the said Winston James Thompson be and he is hereby sentenced to serve a term of Three years in the State Penitentiary, and he is remanded into the custody of the Sheriff to await transportation.

Provided however, it having been made known to the court that the defendant has not been heretofore convicted of a felony, and that the ends of justice and the best interest of the public and defendant will be best served, the court hereby suspends the execution of the above sentence for a period of Five Years and the defendant is hereby placed under the supervision of the State Probation and Parole Board, until the court in term time, or the Judge on vacation, shall alter, extend, terminate or direct the enforcement of the above sentence, and the suspension of said sentence is based upon the following conditions:

(a) Defendant shall hereafter commit no offense against the laws of this or any state of the United States, or of the United States;

(b) Avoid injurious or vicious habits;

(c) Avoid persons or places of disreputable or harmful character;

(d) Report to the Probation and Parole Board, as directed by it;

(e) Permit the probation and parole officer to visit him at home, or elsewhere;

(f) Work faithfully at suitable employment so far as possible;

(g) Remain within a specified area to wit:

Hinds County;

(h) Remain within the State of Mississippi unless authorized to leave on proper application therefor;

(i) Support his dependents;

(j) That I do hereby waive extradition to the State of MISSISSIPPI from any jurisdiction in or outside the United States where I may be found and also agree that I will not contest any effort by any jurisdiction to return me to the State of MISSISSIPPI.

(k) And, further, that he pay a fine of $3750.00 and costs and do pay $2500.00 on bond forfeiture.

So ordered, and adjudged, in open court this the 19th day of October, 19 73.

James D. Shelton
Circuit Judge

STATE OF MISSISSIPPI

County of Jones

I, Donice V. Knight, Clerk of the Circuit Court, said county and state, hereby certify that the above and foregoing is a true and correct copy of the order entered and recorded in Minute Book 30 page 155-6 of the Circuit Court of said County in the above styled and numbered cause.

This the 19th day of October, 19 73.

Donice V. Knight
Circuit Clerk of Jones County

V. KNIGHT By:

A certified copy of this order has been delivered to Probationer, who has been instructed regarding same.

This the _____ day of _____, 19____

_____
Probation Supervisor

I accept the above probation in accordance with the terms thereof.

Sept 75

Name: Winston James Thompson
Probationer

Address: 4318 Walkiah Dr. Jackson, Miss.

by: Karen Holyfield